**IN THE HIGH COURT AT CALCUTTA**
**Ordinary Original Civil Jurisdiction**
**ORIGINAL SIDE**

**The Hon'ble Justice Sabyasachi Bhattacharyya**

**AP No. 780 of 2012**

**UNION OF INDIA, ACTING THROUGH THE GENERAL MANAGER, SOUTH EASTERN RAILWAY**
**VS**
**M/S. JAY BHARAT CONSTRUCTION**

**EC No. 3 of 2024**

**JAY BHARAT CONSTRUCTION**
**VS**
**UNION OF INDIA**

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| For the Petitioner | : | Ms. Aparna Bannerjee, Adv. |
| For the respondents | : | Ms. Swapna Paul, Adv. |
| Hearing concluded on | : | 02.09.2024 |
| Judgment on | : | 10.09.2024 |

**Sabyasachi Bhattacharyya, J:-**

**1.** The South Eastern Railway/present petitioner awarded a work to the respondent. The stipulated time for the work was extended from time to time. Subsequently, the respondent having failed to complete the work within the extended period, the South Eastern Railways terminated the contract after giving two notices as contemplated in the agreement – the first, a seven days' notice and the second a 48 hours' notice.

**2.** Subsequently, the claimant/present respondent initiated an arbitral proceeding in which petitioner/Railways also filed a counter claim. Ultimately the arbitral proceeding was concluded and the final award was passed. The present challenge has been preferred under Section

34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) by the Railways against two components of the award. The first is that Claim No. 2 of the claimant was allowed, directing refund of the security deposit made by the claimant with the Railways. The second component of challenge is the partial refusal of the Counter Claim No.2 pertaining to the risk and cost amount claimed by the Railways for covering the expenses which were incurred in getting the balance work done through a third party after the claimant left the work.

**3.** The claimant stopped the work midway *inter alia* on the allegation that drawings were not supplied for a portion of the work by the Railways.

**4.** Learned counsel appearing for the petitioner/Railways argues that as per the contract between the parties, the entire security deposit was to be forfeited in the case of termination of the contract by the Railways due to the fault of the contractor/claimant. However, the learned Arbitral Tribunal, despite having sustained the termination of the contract and not setting aside the same, directed refund of the security deposit *dehors* the provisions of the contract.

**5.** As per Clause 62 of the General Conditions of Contract (GCC), 2001, which were incorporated as part of the contract between the parties, the railway was entitled to forfeit the security deposit. It is submitted that, as such, the Tribunal failed to comply with Section 28(3) of the 1996 Act by not taking into account the terms of the contract.

**6.** Insofar as the component of part refusal of risk and cost amount is concerned, learned counsel argues that the Tribunal proceeded on the premise that the portion of the risk and cost amount to the extent of which the claimant could not complete work due to non-availability of drawings was to be deducted. While doing so, the Tribunal awarded an amount of Rs.27,20,742/- only by holding arbitrarily that it was the total amount of work which the claimant could have completed before leaving the work. While holding so, the Tribunal considered Annexure 'C' and chose only the component of the work for which drawings were handed over to the claimant for execution. It is argued that the Tribunal failed to appreciate in proper perspective the concept of 'risk and cost', which is the entire amount which the railway was required to pay to the new contractor who was awarded the work for completion of the balance work.

**7.** Learned counsel for the claimant/respondent opposes such arguments and contends that the Tribunal was justified in passing the impugned award and there ought not to be any interference by this Court. The parameters of limited interference under Section 34 of the 1996 Act are not attracted in the present case.

**8.** Since the scope of the present challenge is limited, the other components of the award are not being considered.

**9.** Insofar as the first component of challenge is concerned, it is evident from the impugned award that the Arbitral Tribunal did not set aside the termination by the Railways.

**10.** On April 13, 2007, the claimant/respondent stopped the work. On April 17, 2007, the respondent issued a letter to the petitioner/Railways for closure of the contract under Clause 61 of the

GCC. The Railways wrote back to the respondent on April 19, 2007 requesting the claimant/respondent to restart the work, whereupon the claimant/respondent reiterated its request on April 24, 2007 to close the contract under Clause 61 of the GCC.

**11.** Thereafter, in due compliance of Clause 62 of the GCC, the petitioner/Railways wrote a letter on April 7, 2007 giving seven days' notice to the respondent in terms of the said Clause.

**12.** Upon the respondent not starting work despite receipt of the seven days' notice, the petitioner issued a 48 hours' notice on April 23, 2007, also under Clause 62 of the GCC. When the respondent did not resume work even after the said period, the petitioner duly terminated the contract by its Letter of Termination dated May 29, 2007, also under Clause 62 of the GCC, at the risk and cost of the respondent. In terms of the said Clause, the security deposit of the respondent was to be automatically forfeited.

**13.** Two important factors are to be considered here. First, the petitioner Railway never accepted the unilateral request of the claimant/respondent to close the contract. Secondly, the Railway validly terminated the contract as the claimant failed to resume the balance work despite notice. Even the Tribunal did not hold the termination to be bad or contrary to the contract. Hence, in view of such termination, the entitlement of the Railway to forfeit and retain the security deposit was a foregone conclusion – a given.

**14.** However, the Tribunal, giving a complete go-bye to the provisions of the relevant clauses of the GCC, directed the security deposit to be released in favour of the claimant. The primary ground for doing so was that there appeared to be no delay on the claimant's part up to the first 24 months. For coming to such conclusion, the sole premise of the Tribunal was that extension was given after the first 24 months without imposition of LD.

**15.** However, such premise itself was patently contrary to the contract, since it was entirely at the discretion of the Railways whether to impose LD or not. It is clear from the contract itself that the mere act of grant of extension to the claimant would not tantamount to waiver of the claims of the Railways. Non-imposition of any penalty for the delay does not automatically imply that the claimant/respondent was not at fault for such delay.

**16.** Thus, non-imposition of LD or extension of the DP could not have been a relevant factor in the context of the security deposit. Under Clause 62, in the event the Railways complied with the requirement under the said clause of giving a prior seven days' notice and thereafter a 48 hours' notice, the security deposit would stand automatically forfeited in favour of the Railways. Hence, introduction of the non-imposition of LD or extension of the contract period is an entirely irrelevant consideration in that regard.

**17.** The Railway, having complied with Clause 62, was automatically entitled to forfeiture of the security deposit. Hence, the grant of Claim No.2 of the claimant by directing release of security deposit to the tune of Rs.36,97,916/- was patently illegal and contrary to Section 28(3) of the 1996 Act, being *de hors* the contract.

**18.** On the issue of risk and cost, the Tribunal acted perversely in calculating risk and cost on the basis of Annexure 'C', which was furnished by the Railways in an entirely different context, by overlooking Annexures 'A' and 'B', which were the calculations furnished by the Railways under the head of "Risk and Cost". In the absence of any rebuttal of Annexures 'A' and 'B' and the calculations reflected therein (which were based on the agreement between the parties and the scope of work), which is reflected from the award itself, the Tribunal had no other option but to grant the same.

**19.** Annexure 'C' reflected the portion of work for which drawings had been furnished, but it had nothing to do with the risk and cost calculation. Rather, Annexure 'A' showed the work which had to be done through the third party. Annexure 'B' depicted the portion of the work which could be completed (but was not) by the claimant even without drawings. These two comprised of the 'risk and cost' counter claim. The payments made/to be made to the third-party contractor for completion of the balance work left incomplete by the claimant were also clearly disclosed in both the said annexures.

**20.** While passing the said portion of the award, the Tribunal proceeded on the premise that the claimant was liable to pay risk and cost only to the extent that drawings were made available, by overlooking the fact that the Railways had, by cogent evidence, disclosed the work which could be done by the claimant despite no revised drawings having been furnished, in Annexure 'B'. While awarding risk and cost amount, the Tribunal completely overlooked Annexures 'A' and 'B' and placed reliance on a portion of Annexure 'C', as reflected in Paragraph No.IV-20 of the award.

**21.** The Tribunal failed to consider that Annexure 'C' merely disclosed the breakup of the work, including the activities for which drawing had actually been handed over to the claimant. Basing its award on the said portion, the Tribunal arbitrarily came to the conclusion that risk and cost was payable by the claimant only for such activities for which drawings were provided. What the Tribunal overlooked was that the documents furnished in support of the risk and cost counter claim were Annexures 'A' and 'B', which were completely overlooked without attributing any reason for doing so. As mentioned earlier, Annexure 'A' comprised of a statement showing the detailed calculation of risk and cost recoverable in connection with the agreement whereas Annexure 'B' was a similar statement pertaining to calculation of risk and cost recoverable as per the quantities of work which could be done without the revised drawings of brackets at the time of leaving the site by the claimant.

**22.** The perversity committed by the Tribunal was that without relying on Annexures 'A' and 'B', which were the specific documents furnished in support of the risk and cost claim of the Railway, it relied on a partial component of Annexure 'C', which was entirely a different document furnished by the Railway in support of a separate claim altogether.

**23.** Moreover, the Tribunal failed to appreciate the concept of 'risk and cost', which is in principle compensation for the expenses incurred by an employer for having the balance portion of work, left incomplete by the contractor, through a third party/new contractor. Since such claim was substantiated in detail by the unrebutted Annexures 'A' and 'B', the latter of which clearly indicated the work which could be done even without the drawings, the Tribunal acted with patent illegality and perversity in overlooking such document and granting risk and cost on an entirely erroneous yardstick of only the activities for which drawings were provided, thereby not taking into consideration the works which could be completed even without the drawings as well as the statement of calculation of risk and cost recovery in connection with the left-out components of the work.

**24.** While refusing to allow the 'risk and cost' counter claim in its entirety, the learned Tribunal failed to advert to the relevant material, that is, Annexures 'A' and 'B' and relied on a document irrelevant to the claim, that is, Annexure 'C', thereby committing perversity.

**25.** Also, the learned Tribunal acted contrary to the 'risk and cost' clause in the GCC.

**26.** Hence, the refusal of counter claim no.2 for risk and cost in its entirely is also perverse.

**27.** The Tribunal proceeded on a perverse basis, committing a patent illegality by acting contrary to the contract as mandated under Section 28(3) of the 1996 Act as well as overlooking the relevant evidence while relying on irrelevant documents in passing the aforesaid two components of the impugned award.

**28.** Since comity and consensus between the parties are the very source of authority of the arbitrator, the Tribunal was bound by the terms of the contract between the parties. Having thus acted contrary to the specific terms of the agreement, including the GCC, on both counts, by directing refund of the security deposit and not granting the total claim of 'risk and cost', the learned Tribunal acted with patent illegality.

**29.** While holding so, the Court is aware that patent illegality by itself would not justify interference, since the award impugned herein was passed long before the introduction of sub-section (2-A) to Section 34 of the 1996 Act on and from October 23, 2015; thus, the said sub-section is not applicable to the instant challenge.

**30.** The crucial question which arises, thus, is whether such illegality or even perversity is sufficient to be termed as 'shocking to the conscience' or 'in conflict with the public policy of India'.

**31.** Section 34 (2) (b) (ii) of the 1996 Act provides that an arbitral award may be set aside if it is in conflict with the public policy of India. The other grounds of challenge under Section 34 are not applicable to the present case in view of the discussions above.

**32.** It has to be kept in mind that Explanation 1 to Section 34 (2) (b) of the 1996 Act was also not introduced at the time when the impugned award was passed. The said explanation clarifies the scope of an award being "in conflict with the public policy of India" and restricts the same primarily to fraud/corruption, conflict with *most basic notions of morality or justice* and contravention with the *fundamental policy* of Indian law. Since such yardsticks had not been introduced when the present impugned award was passed, the test of "in conflict with the public policy of India” has to be just that, not confined to the tests of Explanation 1.

**33.** The public policy of India is a fluid notion. In order to lend some texture and context, we are to look at the object and reason of enactment of the 1996 Act itself.

**34.** One of the cardinal objects, as found in the Statement of Objects and Reasons, is to encourage speedy resolution of disputes by the Alternative Dispute Resolution route and thereby to encourage India as an international hub of arbitration. Such policy of India is reflected in Sections 5 and 19 of the 1996 Act in particular. While Section 5 restricts scope of intervention by judicial authorities only to the chosen modes and yardsticks as prescribed in the Act itself, Section 19 empowers the Arbitrator to choose his/her rules of procedure and cuts out the applicability of the Code of Civil Procedure and the Evidence Act in arbitral proceedings.

**35.** Thus, it was open to the Tribunal in the present case to choose its own procedure and to remain unfettered by the provisions of the Code of Civil Procedure and the Evidence Act.

**36.** However, just as the speedy disposal/least judicial intervention policy is an important consideration, it is also a policy of India to adopt the UNCITRAL Model Law on Arbitration and adhere to it substantially. The very authority and premise of the Arbitrator’s jurisdiction is the consensus and contract between the parties. Party autonomy is not restricted to selecting the mode of arbitration as the chosen dispute resolution method but also to vest the arbitrator with the power to act as per the contract. Since the contract containing the arbitration clause is the source of the Tribunal's power, it is implicitly incumbent upon the Tribunal to act within the confines of and according to the provisions of the contract.

**37.** Hence primacy of terms of the contract is also a cardinal part of the policy of India, as also embodied in Section 28 (3) of the 1996 Act.

**38.** Pitted against each other, the policies of primacy of contract and least judicial intervention have to play out in respect of each other in the factual context and circumstances of each case.

**39.** Another feature of the public policy of India is to ensure equality before the law as enshrined in Article 14 of the Constitution of India and access to justice for all. "Justice", to be so provided inherently includes quality justice and not an eye-wash of it. The principles of justice, equity and good conscience are to be, thus, read into it.

**40.** Another very important aspect has to be considered here. Although both Explanation 1 to Section 34 (2) (b) and sub-section (2-A) of Section 34 were introduced in the 1996 Act subsequent to the present impugned award, there is a cardinal difference between the two, which is a decisive factor on whether to apply those provisions to the present case or not. Whereas sub-section (2-A) introduces an altogether new ground of challenge, Explanation 1 is clarificatory in nature, signifying that the contours of the pre-existing grounds of challenge are only being clarified, "for avoidance of any doubt" as mentioned in the Explanation itself. Such clarification has already come into force when this Court is taking up the Section 34 challenge. Thus, such clarification has to be read into the pre-existing grounds of challenge.

**41.** Seen from such perspective, "in conflict with the public policy of India" shall also mean "in contravention with the fundamental policy of Indian law" and/or "in conflict with the most basic notions of morality or justice".

**42.** Coming back to the present impugned award, on the security deposit issue as well as the 'risk and cost' issue in the present case, the Tribunal relied on the self-same logic – that the claimant was liable only for the portion of the work for which drawings were provided to the claimant. However, the said consideration has no connection with either of the said issues.

**43.** On the claim of refund of security deposit, it is noteworthy that the Tribunal did not frame any issue as to unlawfulness of the termination, nor did it arrive at any finding that the termination by the Railway was unlawful or *de hors* the provisions of the GCC. The Tribunal also did not set aside the termination. The parties were not granted any opportunity to address the issue of lawfulness or otherwise of the termination by the Railway.

**44.** If the termination was valid, the Tribunal had no occasion to grant the claim of refund on the finding that "Refund of this amount is a genuine agreemental claim on termination of contract wrongfully by respondent as being wrong doer and defaulter". Such conclusion is, thus, in conflict with the most basic notions of morality and justice.

**45.** The division between the portion of the work for which drawings were supplied and that for which drawings were not is artificial and perverse, since the unrebutted Annexure 'B' provided by the Railway clearly enumerated the incomplete work which could be done by the claimant even without drawings being furnished. Such evidence was completely overlooked by the Tribunal and it proceeded on the premise that the termination was wrongful without otherwise having held so or declaring the termination bad.

**46.** Again, on the issue of risk and cost liability of the claimant, the Tribunal took into consideration an entirely irrelevant document, Annexure 'C', which merely specified the portion of the work for which drawings were provided by the Railway; however, overlooking Annexure "B", which furnished the work which could be completed even without the drawings being supplied. It does not require reappreciation of evidence to see that Annexures "A" and "B", which were the only germane documents in the context of 'risk and cost', were completely overlooked by the Tribunal whereas Annexure "C", which had nothing to do with the issue was solely relied on. Annexure "A" disclosed the amount payable and Annexure "B" is its sub-set, showing the work which was left unfinished by the claimant but could be done without revised drawings.

**47.** Again, the underlying concept of 'risk and cost' was given a go-bye, which is that the employer is to be compensated for work left incomplete by the respondent/contractor which had to be completed through a third party.

**48.** An essential component of the fundamental policy of Indian law is that the Tribunal/Court must advert to the relevant document and materials/evidence to come to its conclusions, and not rely on extraneous and irrelevant materials to decide an issue.

**49.** Such basis tenet of the fundamental policy of Indian law having been violated, the award is tainted by perversity and deserves to be set aside.

**50.** Accordingly, AP No. 780 of 2012 is allowed on contest, thereby setting aside the portions of the award whereby Claim No.2 of the claimant was allowed, directing security deposit to the tune of Rs.36,97,916/- to be refunded by the Railway, and whereby its Counter Claim No.2 was partially refused. The claimant/respondent is held to be liable to pay to the respondent/petitioner-Railway the total amount of Counter Claim no. 2, to the tune of Rs. 4,06,39,192/-.

**51.** The petitioner/Railways shall be entitled to adjust the said amount from the amount payable by the Railway otherwise to the claimant/respondent as per the rest of the impugned award. Any amount over and above the same after such adjustment, if any, shall be recoverable by the petitioner/Railways from the claimant/respondent by putting the award into execution.

**52.** EC No. 3 of 2024 is, accordingly, dismissed.

**53.** There will be no order as to costs.

**54.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

**( Sabyasachi Bhattacharyya, J. )**